

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1065

B

No. 74-1065

P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE,
INC., STATE OF NEW YORK, COUNTY OF NASSAU,
VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD,
SCHOOL DISTRICT NO. 1, SADIE SCHWARTZ,
D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,

Defendants.

D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,
SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT SADIE SCHWARTZ

STANLEY BEALS
Attorney for Defendant-Appellant
SADIE SCHWARTZ
380 North Broadway
Jericho, New York 11753
Tel. 516 931-2500

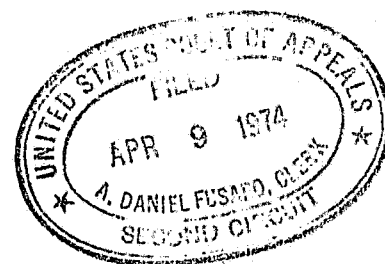


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL DOUGLAS MacARTHUR SR.,
VILLAGE, INC., STATE OF NEW YORK,
COUNTY OF NASSAU, VILLAGE OF
HEMPSTEAD, TOWN OF HEMPSTEAD, SCHOOL
DISTRICT NO. 1, SADIE SCHWARTZ, D.C.R.
HOLDING CORP., HENRIETTA RAND, MARTHA
BARKUS and SHIRLEY HERSHKOWITZ,

BRIEF OF
DEFENDANT-
APPELLANT
SADIE SCHWARTZ

NO. 74-1065

Defendants,

D.C.R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,
SADIE SCHWARTZ,

Defendants-Appellants.

ISSUES

The Appellants, holders of various tax liens acquired from the County of Nassau and the Village of Hempstead in Nassau County, seek recovery from said municipalities for the amounts paid for the purchase of said tax liens. The various tax liens have been held to be inferior to a mortgage held by the United States of America. United States v. General Douglas MacArthur Sr. Village, Inc., 470 Fed. 2nd 675. The issue on this appeal is whether or not the municipalities are required

to refund to the Appellants the amounts paid to the municipalities for the purchase of said tax liens.

PRELIMINARY STATEMENT

The within action was commenced by the Plaintiff, UNITED STATES OF AMERICA, to foreclose a mortgage held by the Secretary of Housing and Urban Development covering the real property which is the subject of this Action, located in the Incorporated Village of Hempstead, Town of Hempstead, Nassau County, New York. The property was owned by the Defendant, GENERAL DOUGLAS MacARTHUR SENIOR VILLAGE, INC.

The Defendant, SADIE SCHWARTZ, is the purchaser of a tax lien sold to her by the Treasurer of Nassau County in accordance with the provisions of the Nassau County Administrative Code (Chapter 272 of the Laws of 1939) as amended. The Defendant, SADIE SCHWARTZ, paid to the County of Nassau the sum of TWENTY FOUR THOUSAND THREE HUNDRED AND FIVE AND 19/100 (\$24,305.19) DOLLARS, claimed to be due for the 1968/69 2nd half School Taxes and the 1969 2nd half County Taxes. (34)

The Plaintiff's action has resulted in a Judgment and Final Order adjudicating that the mortgage held by the Plaintiff was superior to the lien of the Defendant, SADIE SCHWARTZ, and the real estate taxes assessed by the COUNTY OF NASSAU and the VILLAGE OF HEMPSTEAD. (See United States v. General Douglas

MacArthur Sr. Village, Inc., 470 Fed. 2nd 675) (73)

The Defendant, SADIE SCHWARTZ, has cross-claimed against the Defendants, COUNTY OF NASSAU, TOWN OF HEMPSTEAD and SCHOOL DISTRICT #1, for a refund of the taxes paid to the COUNTY OF NASSAU, and on behalf of the other Defendants upon the grounds that the assessments levied were illegal and that the COUNTY OF NASSAU cannot convey title to said Defendant, SADIE SCHWARTZ, in accordance with the provisions of the Real Property Tax Law of the State of New York and the Nassau County Administrative Code. (34-38)

The Defendant, VILLAGE OF HEMPSTEAD, thereafter made a Motion for Summary Judgment to dismiss the cross-claim of the Defendant, D.C.R. HOLDING CORP. (61)

By Order filed on November 9, 1973, the United States District Court, Eastern District of New York, by Honorable Jack B. Weinstein, United States District Judge, granted the Motion for Summary Judgment and a Judgment was entered thereon on November 20, 1973. (71, 85)

The Appellant, SADIE SCHWARTZ, alleged in the cross-claim and urged before the District Court that the taxes assessed by the COUNTY OF NASSAU were illegally levied and assessed. The inability of the

COUNTY OF NASSAU to deliver possession of the real property and a Deed thereto to the Appellant was violative of the obligation of the COUNTY and in breach of the warranties made pursuant to the applicable statutes. The foreclosure of the Plaintiff's mortgage and subsequent acquisition of title to the subject property by the Plaintiff at the foreclosure sale (59) and the determination of this Court made it impossible for the COUNTY OF NASSAU to convey the premises pursuant to Section 5-53.0 of the Nassau County Administrative Code, entitling the Appellant, SADIE SCHWARTZ, to restitution of the sum of TWENTY FOUR THOUSAND THREE HUNDRED FIVE AND 19/100 (\$24,305.19) DOLLARS together with appropriate interest thereon.

QUESTION PRESENTED

The pivotal question in this appeal is whether or not the Appellant, SADIE SCHWARTZ, and other tax lien purchasers, are entitled to a refund of the monies paid to the municipalities at a duly held tax lien sale if the municipality is unable to deliver possession and title to the premises which are the subject of the sale in accordance with the appropriate statutes? The Appellants urge that this question must be answered in the affirmative.

POINT 1

THE COUNTY OF NASSAU CANNOT COMPLY
WITH THE DIRECTIONS OF THE NASSAU
COUNTY ADMINISTRATIVE CODE AND
ACCORDINGLY THE SUMS PAID BY THE
DEFENDANT, SADIE SCHWARTZ, TO THE
COUNTY MUST BE REFUNDED.

The functioning of local governments is dependent upon income derived primarily from taxation of real estate and the collection of those taxes to pay for the many supportive services required of government in our socio-economic climate. The cities, towns, villages and counties in the State of New York derive their authority to tax from the Real Property Tax Law of the State of New York. (49 A McKinney). The procedures for assessment levying and collection of taxes and the exemption of certain real property are described in detail therein. The Nassau County Administrative Code (Laws of 1939, Chapter 272) title B Article 2 thereof, provides for the Enforcement of Collection of Taxes by the County Treasurer. Sections 5-24.0 through Section 5-74.0 provide the methods of collection of taxes and special assessments by the Nassau County Treasurer. The procedures and language are not altogether different or inconsistent with the provisions of the Real Property Tax Law, but being a specific local law are controlling in Nassau County. Section 5-32.0 authorizes the Nassau County Treasurer to bring a plenary action for the

amount of taxes due, together with penalties and interest thereon. In the absence of such an election, Section 5-33.0 requires the Nassau County Treasurer to sell the lien of said taxes at a sale to be held on the third Monday of February in each year following the year for which the tax lien was obtained. Section 5-34.0 authorizes the collection of assessments by sale of the lien thereof. Section 5-35.0 through Section 5-38.0 provide for the publication and advertising of the annual tax sales. The tax sales lists and notices of advertising encompass thousands of parcels of land described by a section, block and lot on the Nassau County Land and Tax Map and the name of the owner of the real property as it appears on the tax books, if available.

At the time of the sale, the various purchasers bid for the tax liens at a rate of interest and penalty as described in Section 5-39.0 and 5-40.0 of the Nassau County Administrative Code. In fact, the bidders at a tax sale, may in theory commence their bids at the maximum rate of TEN (10%) per cent for each six month period within which the tax remains unpaid after the sale not to exceed 24 months. The competition of the bidding only changes the interest rate in an inverse order. It is therefore possible that a tax lien may be acquired bearing a semi-annual rate of interest from TEN (10%) to 0. When a bidder has successfully purchased

the lien, he obtains a Certificate of Sale in accordance with Section 5-41.0 of the Nassau County Administrative Code which reads as follows:

"DEPOSIT; CONTENTS OF CERTIFICATE OF SALE OF TAX LIEN. Each purchaser at a sale of tax liens shall pay to the county treasurer ten per centum of the amount of the tax lien immediately after such sale, and the remaining ninety per centum of such tax lien within sixty days after such sale. Thereupon the county treasurer shall execute to each purchaser, including the county, a certificate in writing which shall contain:

1. A description of the real property affected by the tax lien which description shall refer to the designation of such property on the tax map, if such map has been completed.
2. The name of the owners of the real property as it appears on the tax books.
3. The interest and penalty at which such tax lien was purchased.
4. The date of the sale.
5. A statement that the tax lien was sold for unpaid school district, special district, town, county or state taxes, as the case may be.
6. The amount paid for the tax lien.
7. Such other information as the county treasurer shall deem expedient."

Attached hereto and marked Exhibit "A" is a copy of the tax lien certificate acquired by the Defendant, SADIE SCHWARTZ, at the Nassau County Tax Sale conducted on February 16, 1970. The last mentioned section specifies the contents of the certificate which are mandated by the code. Subdivision 7 of Section 5-41.0 authorizes the treasurer to

include such other information in this certificate as he may deem expedient. Nowhere in the section does it authorize the treasurer to limit the title to the tax lien that is conveyed by the certificate of sale. Section 5-48.0 through 5-52.0 describe the rights of the tax lien purchaser and their obligation to give notice to those persons having a record interest in the real property which is the subject of the tax lien, before they can acquire a deed to the real property as provided in Section 5-53.0. This last section mandates that the treasurer shall execute a conveyance of the real property to the tax lien purchaser, upon his prior compliance with the foregoing section. That section reads as follows:

"CONVEYANCE BY THE COUNTY WHEN TAX LIEN IS NOT SATISFIED. If such tax lien is not satisfied, the county treasurer shall execute to the holder of such certificate of sale of the tax lien a conveyance of the real estate on which the tax lien has been sold. This conveyance shall vest in the grantee an absolute estate in fee, subject to all claims which the county may have thereon for tax or other liens or encumbrances ...
....."

The language of Section 5-53.0 is clear in that the County Treasurer must convey an absolute estate in fee, subject only to the claims in the County for prior taxes or other liens. The section cannot be given the strained interpretation in the unauthorized legend appearing in the tax lien certificate, that is, that the purchaser takes title subject to all other liens and encumbrances. The law appears to be

to the contrary and the tax lien purchaser is entitled to an absolute estate in fee and possession of the real estate. This is apparent from Section 5-68.0 which reads in part as follows:

"REIMBURSEMENT FOR INVALID OR IRREGULAR CERTIFICATE OF SALE. a. When any holder of tax liens shall be unable to recover or retain possession of any real estate affected by the tax lien, by reason of any irregularity or error in:

1. The assessment of real property.
2. The levying of any tax thereon; or
3. The proceedings for the collection of any tax, the county treasurer, with the approval of the county comptroller, shall reimburse such holder. Such reimbursement shall be for the money paid for the tax lien, with interest from the time of its payment, at the rate of either four per centum per annum or the rate of interest bid on the lien, whichever is lower, but not to exceed two years less any payments made toward satisfying the tax lien or amounts collected as interest on the tax lien"

This section is apparently modelled after section 1030 of the RPTL and its predecessor in the Tax Law of the State of New York. Section 1030 of the RPTL also provides that when a purchaser under a sale of a tax lien pursuant to Section 1006 of the RPTL is unable to obtain possession of the real property purchased, that such tax lien buyer is entitled to a refund of the purchase money. To this effect see 50 NY Jur, Taxation, Section 276 and Section 289. Pursuant to the Judgment of Foreclosure and Sale filed in this Action on March 9, 1972, the purchaser (UNITED STATES OF AMERICA) is entitled to exclusive possession of the premises. The

Judgment of Foreclosure and Sale herein further foreclosed all of the right, title, claim, interest, lien and equity of the Defendant, SADIE SCHWARTZ, in the real property. (56-57)

It must follow that if the tax lien purchaser is not able to acquire good title to the property and possession thereof, that the tax lien seller, the COUNTY OF NASSAU, must refund the purchase price. To this effect see OP. Atty. Gen., 1933, 48 St. Dept. 606 and OP. Dept. Taxation and Finance 1935, 52 ST. Dept. 475.

The Defendant, COUNTY OF NASSAU, contracted to sell the tax lien to the Defendant, SADIE SCHWARTZ, and under the authority authorizing such sale, the Nassau County Administrative Code, contracted that upon the purchase of said tax lien and compliance by the purchaser with the applicable provisions of the Nassau County Administrative Code, that the purchaser would be entitled to either (1) reimbursement from the owner of the premises of the amount of taxes paid, together with the appropriate interest rate, or (2) a Deed from the Nassau County Treasurer conveying good title to the purchaser and entitling her to possession of the property. It is obvious that the Defendant County cannot perform the obligations mandated on its part. The Defendant, SADIE SCHWARTZ, has paid the consideration for the tax lien certificate and has complied in all particulars with the provisions of the Nassau County Administrative Code. The

Defendant, County, is unable, because of the intervening interests of the UNITED STATES OF AMERICA, to complete its obligations under the Agreement. The transaction is impossible of performance and the parties must be restored to their status quo. The sale of the tax lien certificate is in effect a sale of an interest in real property and as such there is an implied warranty on the part of the seller that he has good title to that which he assumes to sell.

62. N. Y. Jur., Vendor and Purchaser, Section 44.

May the County, who in its attempt to enforce the collection of taxes and revenues for its support and function, be permitted to sell in the market place something to which it does not have title and cannot pass title? I think not. If municipalities are to continue to collect their revenues by the means outlined in the RPTL and in this case the Nassau County Administrative Code, they must rely on the participation and good will of the tax lien purchaser, no matter how they may be characterized as speculators. To permit a municipality to become unjustly enriched at the expense of a taxpayer, as is sought in this matter, would be self defeating and a travesty on the system.

The inability of the County to complete the transaction because of the impossibility of conveying a good title to the Defendant, SADIE SCHWARTZ, and the inability of the tax lien purchaser to acquire possession of the property, requires the restitution of the proceeds of

the tax lien sale by the County to the Defendant. To this effect, see 10 N.Y.jur., Contracts, Section 378

"The defense of impossibility only goes so far as to excuse the performance of an executory contract; it is not available for the purpose of unjustly enriching one party at the expense of the other. Inability to perform a contract is not a defense to an action to recover the amount paid by the other party. On the ground of a total failure of consideration, the party whose further performance is excused by reason of supervening impossibility is liable to the other party for what the latter has paid under the terms of the contract. Such liability is in terms liability for money had and received."

To permit the County to retain the sums paid by the Appellant, SADIE SCHWARTZ, would present a classic case of unjust enrichment and is contrary to the Laws of the State of New York. To this effect see 50 N.Y. Jur., Restitution, Sections 1 to 6.

C O N C L U S I O N

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED
AND JUDGMENT ENTERED IN FAVOR OF THE DEFENDANT-APPELLANT,
SADIE SCHWARTZ, DIRECTING THE COUNTY OF NASSAU, TOWN OF
HEMPSTEAD AND SCHOOL DISTRICT #1 TO MAKE RESTITUTION
TO SAID DEFENDANT-APPELLANT OF THE SUMS PAID FOR THE
1968/1969 2ND HALF SCHOOL TAXES AND THE 1969 2ND HALF
COUNTY TAXES, TOGETHER WITH APPROPRIATE INTEREST.

Respectfully submitted,

STANLEY BEALS
Attorney for Defendant-Appellant
Sadie Schwartz

CERTIFICATE OF SALE OF TAX LIENS AND REAL PROPERTY AFFECTED THEREBY;
SITUATED WITHIN THE

N2 1264

TOWN OF HEMPSTEAD

\$ 24,305.19

NASSAU COUNTY, N. Y.

THIS IS TO CERTIFY THAT at the sale of tax liens and real property affected thereby, for unpaid

School District Taxes for the Year 1968 - 1969 $2\frac{1}{2}$

State, County, Town and Special District Taxes for the Year 1969 $2\frac{1}{2}$

held by the County Treasurer of the County of Nassau, at the Nassau County Court House, Garden City, Nassau County, N. Y., beginning on February 16th, 1970 which tax sale was held pursuant to the provisions of the Nassau County Administrative Code (Chapter 272 of the laws of 1939 and all amendments thereto) which statutes are by reference made part hereof SADIE SCHWARTZ

..... purchased the tax lien on the property then and there sold, which was assessed to GEN. DOUGLAS MACARTHUR..... said real

property being situated in the Town of Hempstead, Nassau County, N. Y., and described as follows:

DESCRIPTION OF REAL PROPERTY AS SHOWN ON THE NASSAU COUNTY LAND AND TAX MAP

School District	1	Section	34	Block	245	Lot(s) No.	575
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The sum of TWENTY-FOUR THOUSAND THREE HUNDRED FIVE AND 19/100 Dollars was paid to the County Treasurer for the aforesaid tax lien on the property affected thereby, and the lien was purchased at the INTEREST AND PENALTY RATE OF 6 per centum, subject to all claims for taxes or other liens and encumbrances and to any right, title or interest of record of the County of Nassau.

All liens on property involved in this sale are sold subject to the provisions of the Federal and State Soldiers' and Sailors' Civil Relief Acts, and to any and all superior Tax Liens of Sovereignties and other Municipalities.

After the expiration of the time to redeem, unless sooner redeemed, the holder of this tax sale certificate shall be entitled to pursue the remedies provided in the Nassau County Administrative Code for the enforcement of said sale.

The undersigned as County Treasurer shall receive and allow satisfactions of the Tax Lien in the manner and on the terms set forth in the Nassau County Administrative Code (Chapter 272 of the laws of 1939) and amendments thereto. Satisfaction of said tax lien shall be allowed until the delivery of a County Treasurer's deed or until a notice of election to foreclose the tax lien is filed with the County Treasurer by the holder of the tax sale certificate together with proof by affidavit or certificate that a summons, complaint and notice of pendency of action in an action to foreclose the lien has been duly filed in the office of the County Clerk.

WITNESS my hand and official seal
at the Nassau County Court House, Garden
City, Nassau County, N.Y., this 7th day of
April, 1970.


As Treasurer of Nassau County.

By 878

NOTE: In all correspondence please refer to above certificate number and tax sale of February, 1970
Section 5-49.0 of the Nassau County Administrative Code (Chapter 272 of the laws of 1939) provides that "the holder of a certificate of sale of tax liens, at any time after the annual return of taxes to the county treasurer by the receiver of taxes, may pay to the county treasurer any taxes on such return and any older taxes that are a lien on such property."
Do not attempt to make payment of any such taxes to the Receiver of Taxes and when paying such tax to the County Treasurer make sure to state at the time, the payment is made by you as tax lien purchaser.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

THERESA RUBINSTEIN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Nassau County, New York.

That on the 5th day of April, 1974, deponent served two copies of the within Brief of Appellant SADIE SCHWARTZ upon the following:

HON. JOSEPH JASPAN,
County Attorney of Nassau County
Executive Building, Mineola, New York
For Defendant County of Nassau

HON. SAUL HOROWITZ
Corporation Counsel for the Village of Hempstead
For Defendant Village of Hempstead

HON. HOWARD E. LEVITT,
Town Attorney, Town of Hempstead
For Defendant Town of Hempstead

GILBERT HENOCH, Esq.
320 Fulton Street, Hempstead, New York
For Defendant School District No. 1

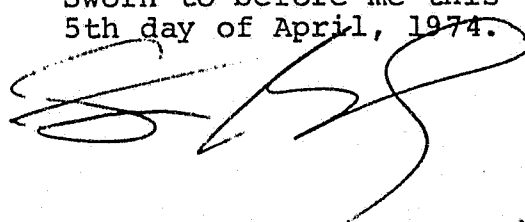
SCHIFFMACHER, ROCHFORD & CULLEN, Esqs.
98 Cutter Mill Road, Great Neck, New York 11021
For Defendant D.C.R. HOLDING CORP.

MICHAEL P. GURLIDES, Esq.
194 Old Country Road, Mineola, New York
For Defendants, Henrietta Rand, Martha
Barkus, Shirley Hershkowitz

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 380 N. Broadway, Jericho, N. Y. in said County of Nassau directed to said Attorneys at the above addresses, that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail. Deponent is over the age of 18 years.


THERESA RUBINSTEIN

Sworn to before me this
5th day of April, 1974.


STANLEY BEALS No. 30-0202550
Notary Public, State of New York
Qualified in Nassau County
Term Expires March 30, 1975